IN THE HIGH COURT OF JUDICATURE AT BOMBAY

O.O.C.J.

WRIT PETITION NO. 2893 OF 1990

Shri. S.F. Rego, of Bombay Indian Inhabitant, retired Judge, Bombay City Civil & Sessions Court, residing at Home-Coming, 47, Waroda Road, Bandra, Bombay 400 050. ... Petitioner

Versus

1. The State of Maharashtra.

2. The Secretary, Government of Maharashtra, Law & Judiciary, Mantralaya, Bombay.

3. The Accountant General, Maharashtra, Maharshi Karve Road, Bombay.

4. The Pay & Accounts Officer, Administrative Building, A-wing, Opp. Drive-in Cinema, Bandra (East), Bombay 400 051. ... Respondents

Mr. Joaquim Reis i/by B. Kanga & Girdharlal for Petitioner.

Mr. P.M. Mokashi, A.G.P. for Respondents.

CORAM : F.I. REBELLO & S.R. SATHE,JJ.
DATED : JUNE 22, 2004

ORAL JUDGEMENT (Per Rebello,J.) :

1. The Petitioner was serving in the Judicial Services of the State of Maharashtra. He was

appointed as a Judge of the City Civil and Sessions Court on 5.12.1977 and superannuated on 4.12.1987. By order dated 26.11.1987 petitioner was re-appointed for the period of 5.12.1987 to 13.4.1988. By subsequent order dated 8.4.1988, he was once again reappointed for the period from 1.5.1988 to 31.10.1988. The Petitioner being reappointed his pay on re-appointment was fixed in terms of Rule 157 of the Maharashtra Civil Services (Pension) Rules, 1982. Rule 2(a) of Rule 157 reads as under :

> "Pay on re-employment plus pension (including pension equivalent of death-cum-retirement gratuity or gratuity in lieu of pension) should not exceed the substantive pay drawn before retirement or the officiating pay, if the Government servant was continuously officiating in that post for at least one year before retirement. In cases, where the substantive/officiating pay drawn before retirement is less than the minimum of the time-scale of the post in which a pensioner is re-employed, pay on re-employment may be the minimum of the time-scale minus pension (including pension equivalent of

death-cum-retirement gratuity or gratuity in lieu of pension)."

2. The Petitioner thereafter was drawing salary and receiving pension as set out in the averments. It is the case of the Petitioner that he was surprised to receive a letter dated 8.3.1990 from the Accounts Officer, City Civil and Sessions Court, Greater Bombay enclosing zerox copy of the letter from 4th Respondent setting out therein that during the petitioner's reemployment from 5.12.1987 to 31.8.1989 an over payment of Rs.9762/- had been made to the petitioner. From the enclosure to the said letter, viz. Pay/Salary Slip, it appears that the said claim has been made on the basis that pension plus pension equivalent to D.C.R.G. amounting to Rs.767/- per month should have been deducted from the salary paid to the petitioner for the period 5.12.1987 to 31.8.1989 amounting to Rs.9,762/-. Thereupon the petitioner addressed a letter dated 21.3.1990 to the 4th respondent herein pointing out that the said amount was not deductable and relied upon the judgement of the **Supreme Court in Shiveshwar Prasad Sinha Vs. Union of India and others, AIR 1986 S.C. 240 and that** the said judgement has been followed thereafter by

the Gujarat High Court in the case of Anuraddha A. Dave Vs. State of Gujarat and another, AIR 1988 Gujarat 257. The Petitioner therefore, requested 4th respondent to direct Accounts Officer of the Bombay City Civil and Sessions Court not to take any steps for recovery of the said amount. The Petitioner received one more letter dated 25.4.1990 from the Registrar, City Civil & Sessions Court, Mumbai which was further to the said letter dated 8.3.1990 from the Accounts Officer stating that the pay for the period of re-employment has been calculated at Rs.6,240/- per month on the basis of the pay slip issued by the 4th respondent herein, that the amount of deductions of relief on pension and pension equivalent of gratuity made from the arrears for the period 5.12.1987 to 31.8.1989 comes to Rs,22,653/- and hence a sum of Rs.16,413/- is to be recovered from the petitioner's pay and the petitioner was called upon to pay the said amount.

. The Petitioner thereupon addressed a notice dated 26.6.1990 to the Respondent setting out the facts as recorded herein and pointing out that the demand for Rs.16,413/- based on deduction of pension equivalent of gratuity is illegal, without

authority of law and is manifestly unjust. The Petitioner protested against the same. Inspite of his protest, the demand was reiterated, the petitioner filed the present petition for the reliefs as set out therein. Various grounds have been raised in the petition which will be adverted to the extent necessary.

3. At the time of hearing on behalf of the petitioners on account of subsequent events which have come on record namely resolution of 16.3.1990, the petitioners have amended their petition to include Para 22(a). What is averred is that by the said resolution dated 16.3.1990, the respondents have decided that the pension equivalent of death cum retirement gratuity or gratuity in lieu of pension is not to be deducted from the pay of re-employed pensioner. Retrospective effect has been given to this Order which is made effective from 1.1.1990. It is contended that the date 1.1.1990 is fixed arbitrarily. There is no rationale in fixing this date. Hence, the petitioner is entitled to the benefit of this order without reference to the date.

4. On behalf of the Respondents, an affidavit was

filed by Shri. Virsinha Murlidhar Patil, Under Secretary (Legal) Judiciary Department, Mantralaya. It is therein pointed out that remuneration admissible on re-employment is as prescribed in Rule 157 of the M.C.S. (Pension) Rules, 1982 and hence, no terms and conditions of the reemployment have been laid down in the order of reemployment itself. For the sake of record it may be stated that in the subsequent order of reemployment dated 1.7.1988 in Paragraph 2 it is clearly set out that the Government has fixed pay of the Petitioner for the period of reemployment as per Rule 157 of M.C.S. (Pension) Rules, 1982. It is then set out that under G.R. F.B. No. dated 18th October, 1988 the pay scales of the State Government servants have been revised w.e.f. 1.1.86. The Petitioner was in service at that time and hence, he was given option to chose the old or revised scale. Since he opted for revised scale, his pay was fixed w.e.f. 1.1.86 in the revised scale and his pension was revised and raised accordingly. Since, his pension is increased, the rate of his pay after reemployment is naturally decreased. It is further contended that on account of revision of pay and discontinuance of Dearness relief the excess amount paid to the petitioner on his

reemployment becomes recoverable. Adverting to the judgement relied upon by the Petitioners, it is pointed out that, that it pertains to the fixation of pay on reemployment admissible to the High Court Judges. Since the petitioner is a retired Judge of the City Civil and Sessions Court, these judgements are not applicable in present case.

5. In answer to the amendment an additional affidavit has been filed by Dinesh Bhimrao Kudale, Under Secretary, Law & Judiciary Department, Government of Maharashtra. In Paragraph 2 it is set out that from the records available with the Finance Department, Government of Maharashtra, it was noted that the Central Government by Office Memorandum No. 3/3/87/Estt.(Pay-II) dated 3rd June, 1988 of the Ministry of Personnel, Public Grievances and Pensions, has issued the memorandum to the effect that while fixing the initial pay of re-employed pensioners, the pension equivalent of gratuity may not be deducted from the pay so fixed and those Orders would have effect from 1st June, 1988. By subsequent memorandum of 12.10.1988 it was clarified by the Government of India that considering the Provisions of the Office Memorandum dated 3.6.1988 in those cases where pension

equivalent of gratuity was taken into account for initial pay fixation, their pay would require to be re-fixed with effect from 1st June, 1988 by ignoring the element of pension equivalent of gratuity. It is then set out in the affidavit, that the State of Maharashtra decided to adopt the Government of India Orders contained in its Office Memorandum dated 3rd June, 1988 and 12th October, 1988 for the State Government pensioners and the State Government took a conscious decision that the provisions contained in the Government of India's orders should be made applicable to the State Government pensioners with effect from 1st January, 1990- and necessary orders to that effect have been issued under the Government Resolution of the Finance Department, bearing No. RES-1089/479/SER-4 dated 16th March, 1990. It is then set out that since, the State Government has taken a conscious decision to bring into force the said Government Resolution dated 16th March, 1990 with effect from 1st January, 1990, the said action cannot be said to have been done arbitrarily as alleged by the petitioner, as petitioner's reemployment came to an end prior to 1.1.1990 on which date he was not in service. The Petitioner is not entitled to benefits as set out therein.

6. Various grounds have been taken. It is not necessary for us to go into all the grounds, in view of the subsequent event, namely the decision by the Sate of Maharashtra to exclude the pension equivalent of gratuity for the purpose of calculating the pay on re-appointment after 1.1.1990. The only other ground to be considered would be whether the pension equivalent of gratuity could be included to fix the pay on re-exmploment.

7. The main question therefore, is whether it was open to make a distinction between those who were in service on 1.1.1990 and those who were no longer in service on 1.1.1990. It is open to the State Government to fix a cut off date. That date however, has to have a nexus with the object sought to be achieved. The object was to exclude the pension equivalent of gratuity for the purpose of fixing pay. Though the Office Memo was issued on 16th March, 1990 it was to be with retrospective effect from 1.1.1990. This followed the decision of the Central Government to exclude the pension equivalent of gratuity for its employees. The Central Government had fixed the date for exclusion as 1.6.1988. The question then is why should the

benefit be given to only those who were in service on 1.1.1990 and not from 1.6.1988 when the State Government itself decided as can be seen from the affidavit to follow and apply the Government of India's resolution dated 3.6.1988 also to its employees. Though it was not set out in the petition, the learned A.G.P. was asked as to whether in the matter of condition of services like pay scales, whether the Respondents follow the same pay scales for its employees as that of Central Government. On instructions, the court is informed that the State Government grants the same pay scale for similar posts to its employees as those of the Central Government in terms of the classification done by the Pay Commission's report as accepted. The question therefore, arises as to whether the State Government was right in excluding a class of pensioners who retired between 1.6.1988 to 31.12.1999.

. On behalf of the Petitioners, learned counsel **had relied on the judgement in the case of D.S. Nakara and others Vs. Union of India, AIR 1983 S.C. 130. That case was in the matter of fixing** pensionary benefits. The issue before the Apex court was whether the Respondents therein were

right in granting pension from a particular date to the exclusion of others like the petitioners not falling within the cut off date. The Apex Court held that classification could not be sustained and accordingly struck down the cut off date. The Apex Court observed as under :

> "Thus the fundamental principle is that Article 14 forbids class legislation but permits reasonable classification for the purpose of legislation which classification must satisfy the twin tests of classification being founded on an intelligible differentia which distinguishes persons or things that are grouped together from those that are left out of the group and that differentia must have a rational nexus to the object sought to be achieved by the statute in question."

In that case,the court posed itself the following question :

> "What then is the purpose in prescribing the specified date vertically dividing the pensioners between those who retired prior to the specified date and those who retire subsequent to that date? That poses a further question, why was the pension scheme liberalised? What necessitated liberalisation of the pension scheme?"

Answering the issue the Apex Court observed :

> "If it appears to be undisputable, as it does to us that the pensioners for the purpose of pension benefits form a class, would its upward revision permit a homogeneous class to be divided by arbitrarily fixing an eligibility criteria unrelated to purpose of revision, and would such classification be founded on some rational principle? The classification has to be based, as is well settled, on some rational principle and the rational principle must have nexus to the objects sought to be achieved. We have set out the objects

underlying the payment of pension. If the State considered it necessary to liberalise the pension scheme, we find no rational principle behind it for granting these benefits only to those who retired subsequent to that date simultaneously denying the same to those who retired prior to that date. If the liberalisation was considered necessary for augmenting social security in old age to government servants then those who retired earlier cannot be worse off then those who retire later. Therefore, this division which classified pensioners into two classes is not based on any rational principle and if the rational principle is the one of dividing pensioners with a view to giving something more to persons otherwise equally placed, it would be discriminatory. To illustrate, take two persons, one retired just a day prior and another a day just succeeding the specified date. Both were in the same pay bracket, the average emolument was the same and both had put in equal number of years of service. How, does a

fortuitous circumstance of retiring a day earlier or a day later will permit totally unequal treatment in the matter of pension. One retiring a day earlier will have to be subject to ceiling of Rs.8,100/- p.a. and average emolument to be worked out on 36 months' salary while the other will have a ceiling of Rs.12,000/- p.a. and average emolument will be computed on the basis of last ten months' average. The artificial division stares into face and is unrelated to any principle and whatever principle, if there be any , has absolutely no nexus to the objects sought to be achieved by liberalising the pension scheme. In fact this arbitrary division has not only no nexus to the liberalised pension scheme but it is counter productive and runs counter to the whole gamut of pension scheme. The equal treatment guaranteed in Article 14 is wholly violated inasmuch as the pension rules being statutory in character, since the specified date, the rules accord differential and discriminatory treatment to equals in the

matter of commutation of pension. A 48 hours difference in the matter of retirement would have a traumatic effect. Division is thus both arbitrary and unprincipled. Therefore, the classification does not stand the test of Art.14."

. Apart from holding that division classifying the pensioners into two classes, is not based on any rational principal, the Apex Court further held that :

"Further the classification is wholly arbitrary because we do not find a single acceptable or persuasive reason for this division. This arbitrary action violated the guarantee of Art.14."

. After having so answered, the Apex Court directed that the pensioners be accordingly paid the pension.

8. In the case of Shiveshwar Prasad Sinha (supra) for consideration before the Apex Court was a similar provision like Rule 157. We may gainfully

reproduce the same :

> "Chairman - The same remuneration/allowances and conditions of service as admissible to a High Court Judge provided that on retirement as a **Judge, the pay plus pension and pension equivalent of other retirement benefits, if any, shall not exceed Rs.3,500/-".**

. The only distinctive feature in this rule is that there is no specific reference to Death cum Retirement Gratuity. The rule which is quoted above indicate that pension equivalent of gratuity and other retirement benefits would be included for the purpose of pay which was fixed at Rs.3,500/-. Dealing with the issue whether gratuity can be considered for the purpose of considering pay on reemployment, the Apex Court noted that the gratuity is payable under Section 17(a) of the High Court Judges (Condition of Service) Act, 1954. Before the Court it was conceded that in case petitioner was not reemployed after 1.2.1980 the date on which he retired no recovery was to be made from his pension. The Apex Court then held that

there is absolutely no justification for directing recovery. What the Apex Court meant therein was that if for the purpose of computing pension, death cum retirement gratuity benefit could not be deducted, there was no question of making deduction on that count from the pay on re-employment. Under M.C.S. (Pension) Rules, 1982 it is provided for retirement gratuity/death gratuity to the Government servant on his completing five years qualified service and who become eligible under Rule 110. Rule 110 provides in what manner the amount of service gratuity shall be calculated. Here also, the gratuity is payable under a different rule. Applying the same test, if for payment of pension, there is no deduction of equivalent of death cum Retirement gratuity, then that component also could not be included for the purpose of fixing pay on re-appointment. We may mention here that the rule which provides for deduction has not been challenged.

9. Considering the test laid down in the case of D.S. Nakara (supra) let us consider whether classification of those who retired between 1.6.1988 and 31.12.1989 and those who retired after 1.1.1990 is reasonable and results in an

intelligible differentia which distinguishes persons or things that are grouped together from those that are left out of the group and whether that differentia has a rational nexus to the object sought to be achieved by the Office Memo in question. If the object to be achieved was to give benefit to exclude gratuity for the purpose of computing pay on re-employment, one really does not understand as to how those who had retired earlier can be excluded as all belonged to one class of superannuated employee who were reemployed. Let us assume that one was in service on re-employment at the relevant time, the Office Memo was issued and another was not in service when the Office Memorandum was issued. That perhaps could have been a fact to consider whether the classification was reasonable and based on an intelligible differentia. However, there was subsequent revision of pension pursuant to recommendations of Pay Commission with effect from 1.1.86 and the benefits of the revision include revision of D.A. to pensioners. Considering that the revised pension including revised D.A. and other retiral benefits had to be considered, and added for fixing the pay on re-employment. This after the employee had ceased to be reemployed. In other words, the

pay of an employee who had been reemployed after 1.1.86 and re-employment had come to an end before 1.1.90, his pay on re-employment had to be fixed based on the revised pension without excluding the pension equivalent of gratuity but if the employee happened to be in service on 1.1.1990. Such employees pension equivalent of gratuity would be excluded for the purpose of computing pay on re-employment. Applying now the second test laid down in D.S. Nakara (supra), the respondents must show some basis as to why they chose the date 1.1.1990. In the affidavit of State Government itself, it is set out that they have sought to rely on the Government of India's resolution which was made applicable to all those re-employed as on 1.6.1988. It was further obligatory or duty bound on the State Government to show as to why these re-employed and in service between 1.6.1988 to 31.12.1989 were to be excluded and or why they would fall in the class of their own. There is no explanation forthcoming and there can be none. If the Government had decided to follow the Government of India's Resolution in respect of also its employees who were drawing the same pay scales as employee of Central Government then in our opinion in the absence of showing material as to why one

class is excluded, it was not open to the State to arbitrarily fix the date as 1.1.1990 based on Government Resolution of 16th March, 1990. In case of those re-employed but had retired between 1.1.1990 and 15th March, 1990 were given the benefit though not in service on 16th March, 1990. Then why exclude who were in service between 1.6.88 and 31.12.89. We are not dealing with a cut off of 1.1.86 as that is not in issue here. It is possible that the State Government for the purpose of administrative reasons, might have fixed the said date, but that date as set out in the case of Nakara must satisfy the test of non-arbitrariness. In the instant case, it does not so satisfy. We are of the opinion that therefore, excluding a class of employees who were re-employed and working between 1.6.1988 and 31.12.1999, was arbitrary being unreasonable and they would also be entitled to the benefits of the said resolution.

10. It is true that it is not for this court to normally fix the date. However, in the instant case, by striking down the date itself will not result in achieving the object as laid down in the case of Nakara. It will be open to this court itself considering the Government of India's

Resolution which the State Government has adopted to read the date as 1.6.88 in Resolution No.RES-1089/479/ser-4 dated 16th March, 1990. In Para 3 and 4 wherever the date 1.1.1990 appears the same to be read as 1.6.1988.

. Having so read the date, admittedly the petitioner was in service on 1.6.1988. Once the benefit of the resolution dated 16.3.1990 can be applicable to the petitioner, the demand by the respondent would be without jurisdiction.

11. In the light of that, we direct the respondent not to make any deductions or call upon the petitioners to pay any amount or make demands from his pension or call upon the petitioner to pay the amounts in terms of letter dated 6.3.1990 and 25.4.1990 issued by the Officers of the City Civil and Sessions Court, Greater Mumbai.

. It is further made clear that if any deductions have been made where respondents were not entitled to deduct, the respondents are directed to pay the said amount to the petitioners within the period of twelve weeks from today.

. Rule made absolute in terms aforesaid. There shall be no order as to costs.

. P.A. to issue authenticated copy of this order.

(F.I. REBELLO,J.)

(S.R. SATHE, J.)